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ABSTRACT

The fourth in a special series of handbooks dealing with constitutional themes, this document looks at power in the context of the U.S. Constitution. "The Constitution's Prescription for Freedom" (L. Peach) examines the separation of powers provided for in the Constitution. "The Concept of Power" (C. Roach) is a series of strategies, some using children's literature, for teaching students in grades K-6 about power. "Legislators, Police Officers, and Judges" (Utah Elementary LRE Program) is a lesson plan for grades 4-5 that helps students place public officials into three categories (rule-makers, rule-enforcers, and rule-appliers) corresponding to the three branches of government. "The Presidency" (C. Yeaton; K. Braechel) is a lesson plan designed primarily for 4th graders, but suitable for use with students through grade 6. It helps students understand the role and responsibilities of the president. "Authority" (Law in a Free Society), for grades 7-9, is a lesson designed to help students recognize that the consent of the governed is the ultimate source of authority in the U.S. political system. "Tides of Power" (J. Daly) is a lesson plan designed to show the sources of power under federal and state systems of government and is appropriate for secondary students. "When the Constitution Isn't Enough" (R. S. Peck) examines the importance of state constitutions as they relate to the federal Constitution. "Comparing State and Federal Constitutions" (L. Peach) is a lesson plan on the same topic for secondary students. (JB)

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Power

Constitutional Update

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American Bar Association
Special Committee on Youth Education for Citizenship

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Lucinda Peach

The Constitution's Prescription for Freedom

After the War of Independence with England, the citizens of the newly founded American nation were concerned about how to establish a system of government that would allow the people to remain sovereign and free to govern themselves, rather than being subject to the tyranny of the state. By dividing the powers of government among different branches, each having its own functions and defenses to prevent control by the others, and by leaving power to the states, it was thought that the people would remain able to "secure the Blessings of Liberty to ourselves and our posterity." The Constitution thus created the framework for dividing power among three separate and distinct branches of government: legislative, judicial and executive.

Throughout our constitutional history, there have been many situations where one branch has been accused of violating the principle of separation. Nevertheless, the "separation of powers" was designed so well that it has served to maintain our democracy for almost 200 years. This article will examine how the framers came to choose our particular system of government, how that system was designed to function, and how the separation of powers has served to maintain our democracy despite attempts to violate it.

Background

According to James Madison, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Jefferson and Adams agreed. However, the idea that governmental power would be less subject to abuse if it were distributed among different branches arose long before the framers decided to include it in the Constitution. The philosopher who is generally considered to have formulated the concept of separation of powers was the 18th century Frenchman Baron de Montesquieu, although aspects of the principle are thought to have originated with Locke and even Aristotle.

Montesquieu recommended a system of checks and balances, in addition to the separation of powers, to restrain government from exercising too much authority. He suggested that the executive branch should have a veto over legislative acts, that there should be two branches of the legislature which would act to check one another, and that the legislature should check the executive by controlling appropriations and making the executive's ministers accountable for the faithful execution of the laws. His book *The Spirit of the Law* was widely read at the time the Constitution was written and had an obvious influence on the framers.

Practical considerations also influenced the framers' ideas for how to form a workable plan for governing themselves. They had recently witnessed first-hand the abuse of power exercised by the English monarch and had been forced to declare war in order to liberate themselves from control by the British crown. They had little more confidence in the British Parliament, especially since Parliament's laws were not subject to constitutional review by the courts. However, the English plan of government did give the framers a familiarity with the ideas of a limited monarchy whose exercise of power was subject to due process of law.

In addition, many of the colonial states' constitutions provided for both a separation of powers as well as a three branch system of government, comprised of executive, legislative and judicial offices.

These constitutions proved better in theory than in practice, however. Since the executives had no real authority, the legislatures were effectively in control. Separation was untested and undefined. These experiences led Madison to conclude that the branches of government had to be independent as well as separate from one another. The judiciary could not serve only at the pleasure of the legislature because this would lead judges to base decisions on political considerations (pleasing the legislature in order to be reelected) rather than on constitutional and legal ones. Similarly, if the executive branch was dependent upon the legislature for reelection, it would not be able to exercise any real independent authority.

The framers encountered some practical problems in implementing the system of separation of powers in their plan for a new government. They did not have a strong existing government to work with. Instead, there existed a number of separate state governments which had been loosely but ineffectively affiliated under the Articles of Confederation. The Articles had not provided for a separation of powers and the Congress it created was without power to make laws. Since no monarchy existed in America, there was no readily available king to head the executive branch. And since no formal class system existed, there was no easy division for the legislature as there was in Britain, with an upper House of Lords and lower House of Commons. Furthermore, the framers did not want to replicate the British system of government, but wanted to vest sovereignty in the people, while retaining some authority in the states. After much argument and debate, they were able to overcome these difficulties.

Separation and Structure

The framework of the first three articles of the Constitution itself reflects the separation of powers principle. Article I creates the Congress, vesting all legislative powers in a Senate and House of Representatives. Section 8 of this article sets forth specific powers of Congress, including that "[t]o make all laws which shall be necessary and proper for carrying into execu-

tion the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Article II creates the office of the president, vesting it with the executive power. Section 2 makes the president the commander in chief of the army and navy of the United States, gives the executive the power to pardon, make treaties, appoint judges of the Supreme Court and veto legislation (subject to limitations discussed later). Section 3 orders the president to "take care that the laws be faithfully executed."

The Supreme Court is established in Article III, which vests it and "such inferior courts as the Congress may, from time to time, ordain and establish" with the judicial power. The Supreme Court's jurisdiction is established in Section 2 as including the authority to hear all cases arising under the Constitution, the laws of the United States and treaties and controversies to which the United States is a party, between two or more states, between a state and citizens of another state, between citizens of different states, and between a state, or its citizens, and foreign states.

Thus, each branch of government was established to carry out a different and specific function. Congress would make the laws, the president would carry them out and the Supreme Court (and lower courts) would ensure that the laws were made and enforced properly.

Congress was designed to be the most powerful branch because it was most directly accountable to the people, being elected democratically. The Supreme Court was viewed as the "least dangerous" branch because its powers were thought to be the weakest. The powers of the presidency, however, were an unknown, since Americans had no prior experience with this form of executive authority.

Under the Articles of Confederation, Congress appointed various ad hoc committees to carry out the various administrative tasks of government, but did not give them power or independence. Early state constitutions similarly made the executive subject to the legislature. Because this led to legislative encroachments on the other two branches, the framers rejected proposals to have Congress elect the president. They also protected the president's salary from legislative control and created the executive's powers by an express constitutional grant rather than making it subject to legislative determination. The president, for example, has the sole power to grant pardons, a power which Congress cannot interfere with, just as the other two branches cannot interfere with Congress' impeachment power.

As history has unfolded, however, expectations about how much power the different branches of government would exercise have not been met. During different times, the balance of power appears to have shifted, first from Congress to the Supreme Court, and, during recent decades, to the president. Some of these shifts have been controlled by the system of checks and balances, which the framers developed to ensure that the framework of government contained enough relationships between the branches to prevent one from acting too independently of the others.

Checks and Balances

The new Constitution was criticized for not sufficiently distinguishing between the functions of each branch, in violation of the separation principle. Madison responded to such criticisms by contending that, although there was in fact no strict separation, the system was adequate to prevent too much power from accumulating in one branch.

The method that was used to prevent a power grab by one branch was the system of checks and balances that was written into the Constitution. This system establishes certain specific limitations on the independent exercise of authority by each branch. It creates some overlap of functions, and so runs contrary to the strict separation of powers, but the overall effect is to limit the branches.

Limitations on Congress

Although Congress wields a great deal of power under its constitutional mandate to make the law, its authority is limited. One significant limitation is internal – the result of having two houses of Congress which serve as a check on one another. This division of legislative power is partially the result of the framers' concern about giving too much power to this popularly elected branch of government – "the excess of democracy," as Elbridge Gerry called it. A similar kind of limitation is contained in Article I, Section 6 of the Constitution, which prohibits members of Congress from holding any other federal governmental office during the time for which they've been elected.

Another limitation placed on the legislature is the president's power to veto legislation. This power is not absolute, since Congress can override the veto by a two-thirds majority vote in both houses. In addition, if the president fails to return legislation within 10 days (excluding Sundays), it usually becomes law automatically, but if Congress adjourns before the 10 days have elapsed, the president's failure to act kills the bill, creating a "pocket veto." The hurdles involved in passing legislation over a veto have served to deter Congress somewhat from enacting controversial laws.

In addition to the veto power, the president also exercises considerable authority over Congress by recommending legislation. Because Congress is too large and unorganized to originate most legislative programs, the president has taken over this responsibility. In recent years, almost all important legislative proposals have originated in the executive branch.

The judicial branch also exercises some control over Congress. Although the Supreme Court does not give advisory opinions, its decisions as to the constitutionality of legislation may prescribe the outer limits within which Congress may act. For example, Congress often delegates power to the executive or to independent governmental agencies to carry out certain functions. If the Supreme Court determines that Congress has gone too far and delegated powers which the Constitution has allocated to the legislative branch, then it may declare such delegation of authority unconstitutional.

Limitations on the President

In recent years, the presidency has often seemed to overshadow the other two branches, but remember that the Constitution limits the executive in many ways. The president has the power to nominate persons for office, but ambassadors, judges, and other appointees won't serve unless they are confirmed by the Senate. The president can make treaties, but they won't go into effect unless they are ratified by a two-thirds vote of the Senate.

"Executive privilege," an implied separation of power, gives the president immunity from the judicial process, in all but extraordinary cases. This limits the ability of courts to interfere with the executive branch. However, federal courts act somewhat as a constraint on the activities of the executive when they rule on the constitutionality of executive activities. *United States v. Nixon*, 418 U.S. 683 (1979), arising out of Watergate, discussed below, is an example of this type of judicial check on the powers of the president.

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The sole penalty for misbehavior by the president is removal from office—impeachment. Article I, Section 3 of the Constitution establishes the procedure for impeachment. The House of Representatives initiates the process by passing a resolution charging the president with "Treason, Bribery or other high Crimes and Misdemeanors." The House then appoints managers to prosecute the president in a trial before the Senate sitting as a court, at which the Chief Justice presides. A two-thirds majority vote of the Senate is required for impeachment. The framers intentionally made the procedure a difficult one to ensure the executive's freedom from congressional interference under normal circumstances.

Limitations on the Judiciary

Article III of the Constitution gives Congress some control over the federal courts by authorizing it to establish lower federal courts and decide the limits of their jurisdiction as well as to regulate the appellate jurisdiction of the Supreme Court. Under Article 2, Section 4, Congress may also remove federal judges from office if they violate the "good behavior" requirement of Article III, Section 1. The president, similarly, has some indirect control over the courts through exercising the power to appoint federal court judges. President Roosevelt's "court-packing" plan and President Reagan's appointment of politically conservative judges provide examples of attempts to use this power.

In an attempt to restrain the Supreme Court from striking down New Deal laws, President Roosevelt wanted Congress to pass legislation allowing him to appoint one new justice for every member of the Supreme Court over age 70, up to a limit of six new justices. By diluting the membership of the Court with members who shared his political views, the president hoped to be able to control its decision-making. Congress rejected the court-packing proposal on the ground that it would violate the system of checks and balances. But by this time, several of the older justices had resigned, and Roosevelt was able to appoint all but two members of the Court by the end of his term in office. Although the court-packing plan itself failed, in the long run the president was able to remake the Court.

In addition to limitations imposed on the Court by the other branches, the Supreme Court has also fashioned some limitations on its own decision-making powers which are not expressly provided for in the Constitution. An example of this is the "political question" doctrine, by which the Court decides that it is not the appropriate body to resolve the issue involved in the case before it. Sometimes the rationale used by the Court is that the matter has been committed by the Constitution to the politically accountable branches of government—Congress and the executive—and must therefore be resolved by them. The Court has declared many military questions, such as the necessity for calling out the militia, and foreign policy questions, such as the constitutionality of the war in Vietnam, to be political questions which it cannot rule on.

The system of checks and balances has not always been sufficient to prevent alleged violations of the separation of powers, however. Several times throughout our constitutional history, situations have arisen in which one branch of government has been accused of invading the territory of another or giving its own power to another branch in violation of the Constitution.

Violations of the Separation Principle

There are several different types of alleged violations of the constitutional separation of powers. Two in particular have recurred throughout history and remain important issues today. One involves the war powers; the other the legislative veto.

A problem concerning the war powers arises because the Constitution divides the power to wage war between the president and Congress. The framers gave Congress the power to declare war because it wanted the power vested in the body most broadly representative of the people. Congress was also given the power to tax and finance expenditures for defense, determine the rules of warfare, raise and support the army and navy and to make all laws necessary and proper for exercising the war power. But since the framers wanted to be sure that military forces could respond quickly to repel sudden attacks, the president has the authority to mobilize the armed forces.

As commander-in-chief of the armed forces, the president also has the power to see that the laws are faithfully executed and peace is preserved. This power arguably authorizes the president to use military force where required to protect the national interest, unless Congress prohibits it.

One issue which the framers neglected to resolve in the Constitution is whether the executive's power to declare war enables the president to commit troops to foreign soil in the absence of an express declaration of war, without congressional approval. Three theories have been used to justify this type of action.

In the *Prize Cases,* 67 U.S. 635 (1863), evolving out of the Civil War, the Supreme Court upheld President Lincoln's blockade of the southern states without a congressional declaration of war. The theory underlying these cases was that the war power was broad enough to authorize the president's use of troops to quell domestic insurrections. President Theodore Roosevelt used a theory of neutrality to send troops to Panama in 1903. He argued that the U.S. forces were not there to take sides, but merely to preserve the American investment in the Panama Canal, even though they were actually being used to fight the Columbian army. President Truman similarly ordered troops sent to South Korea to repel North Korean troops without authorization from Congress. In a third situation, President Kennedy used a collective agreement between the Organization of American States and the United States as justification for a quarantine during the Cuban missile crisis.

Public tolerance for such unauthorized uses of force by the president terminated with the escalation of the Vietnam War. Although a number of lawsuits were filed against the war on the grounds that Congress had not given its authorization, the Court refused to hear them, mostly on the basis of the political question doctrine.

In 1973, Congress passed the War Powers Resolution over the president's veto to "insure that the collective judgment of both the Congress and the President will apply to the introduction of U.S. armed forces into hostilities." The resolution establishes a 60-day limit on presidential commitment of U.S. troops abroad without specific congressional authorization and requires the president to consult with Congress whenever possible before introducing armed forces into hostilities. President Nixon condemned the resolution as an unconstitutional restriction on the commander-in-chief's authority to meet emergencies. Others have agreed. Yet the constitutionality of the War Powers Resolution has not yet been decided by the Supreme Court, and the conflict over the proper division of the war power between Congress and the president continues.

Congress and the president have long had conflicts about the proper spheres of their respective powers. President Washington refused to turn over papers to Congress concerning the Treaty of Commerce

negotiated with Britian in 1795, despite Congress' demand to see them. President Jackson opposed the renewed charter for the Second Bank of the United States, which Congress wanted to pass. President Lincoln had vehement struggles with Congress over the proper reintegration of the southern states into the union at the end of the Civil War. And Congress refused to ratify the Treaty of Versailles negotiated by President Wilson at the end of World War I. The war powers issue is simply another example of the ongoing power struggle between these two branches.

Legislative Veto

Another major separation of powers problem has emerged from Congress' practice of passing legislation which delegates certain powers to the executive branch. Congress has enacted over 200 statutes containing legislative veto provisions. For many years, it has had a practice of delegating much of its powers in the areas of finance and departmental organization to the president. For example, the president prepares reorganization plans and presents them to Congress. These go into effect automatically unless vetoed by either branch of Congress within a specified time period. Sometimes, these delegations have been viewed as invalid because they give away powers which the Constitution has committed to Congress to exercise.

Delegation occurs in different ways. Sometimes, Congress delegates powers but retains the authority to retract by a concurrent resolution of Congress not requiring presidential approval. Other times, Congress may retain the authority to review and approve, by one or both houses of Congress, proposed administrative actions of the executive branch.

In *I.N.S. v. Chadha,* 103 S.Ct. 2764 (1983), the Supreme Court invalidated a legislative veto provision contained in immigration regulations. The regulation at issue provided that the attorney general (part of the executive branch) could decide to suspend an order of deportation issued by an immigration judge. Congress, however, retained the right to veto the attorney general's decision by a two-thirds vote of either the House or the Senate within a certain time after the decision. In the particular case at issue, the attorney general had decided to suspend an order of deportation which had been issued to Chadha, a Kenyan student with a British passport who had remained in the United States after his visa had expired. Kenya refused to take him back and British officials told him it would be at least a year before he would be entitled to immigrate to England. These circumstances persuaded the attorney general that Chadha should be permitted to stay. At the last minute, and without debate, the House of Representatives decided to pass a resolution which rescinded the order suspending deportation, in effect ordering Chadha deported.

The Supreme Court upheld Chadha's claim that the legislative veto was unconstitutional. It found that the House's veto was "legislative action" within the meaning of Article I, Section 7 of the Constitution because it "had the purpose and effect of altering the legal rights, duties and relations of persons. . .outside the legislative branch." As such, Congress was required to approve its decision in both houses and then present it to Congress. Since it had not done so, the veto was invalid.

Many questions have arisen since the *Chadha* decision about the status of the legislative veto contained in hundreds of other statutes. Are they all invalid, or was Congress' veto in *Chadha,* which the Court determined was "legislative action," different from those it has enacted elsewhere? What is the continued viability, if any, of this device Congress has used to cut down on its work load while retaining some control over executive actions? Hopefully, future decisions will clarify more precisely the separation of powers concerns which led the Court to invalidate the legislative veto contained in *Chadha.*

Other Separation Problems

While the war powers and legislative veto situations illustrate recent separation of powers problems, many other types of separation issues have arisen since the Constitution was written. One involves the allegation that the courts have unduly interfered with the Congress by invalidating certain types of legislation on constitutional grounds. This was the cause of Franklin Roosevelt's court-packing plan. The Supreme Court struck down New Deal economic legislation by narrowly interpreting the commerce and tax clauses of the Constitution. And by broadly interpreting the due process clause of the Fourteenth Amendment, the Court similarly prohibited state regulation of the economy. The Court's decisions were criticized as an improper interference with the political branches.

Another alleged violation of the separation principle involves efforts by the president to fill the federal courts with judges who have the same political views as his own. The criticism that this violates separation of powers by interfering with the autonomy and independence of the judiciary has been made not only with respect to Roosevelt's court-packing plan but also recently in opposition to President Reagan's nomination of politically conservative federal judges.

Similarly, efforts by Congress to control the judiciary by removing its jurisdiction to hear certain types of cases have been viewed as an unconstitutional interference with the proper separation of powers. Although there is little precedent on this issue, in *United States v. Klein,* 80 U.S. 128, 147-48 (1871) the Supreme Court invalidated congressional legislation attempting to limit the Court's jurisdiction, since it was found to abridge the president's Article II power to grant reprieves and pardons for federal offenses.

Another separation issue involves the claim of executive privilege. This issue arose in the Watergate prosecutions when President Nixon refused to turn over tapes to congressional investigation committees on the grounds that separation of powers means that each branch has the absolute right to defend itself against incursions by the other branches. In *U.S. v. Nixon,* 418 U.S. 683 (1974), the Supreme Court held that neither the separation of powers nor the need for confidentiality sustained an exclusive executive privilege of immunity from the judicial process.

Not all instances of perceived violations of the separation principle involve actions of one branch which interfere with the authority of another. Sometimes the issue involves one branch's failure to act itself, allowing another branch to exercise powers not validly its own or which the Constitution has committed to the inactive branch. One example of this is the legislative veto. Another is the Supreme Court's use of the political question doctrine to avoid making difficult decisions involving the other branches.

Conclusion

The system of separation of powers embodied in the Constitution is not a perfect instrument, as the foregoing discussion demonstrates. It has not always indicated the limits of each branch's authority, either within its own sphere or in relation to those of the other two branches. Nor has it always been able to clearly resolve conflicts which have arisen between the three branches. Nevertheless, the framework of independence and checks and balances established almost 200 years ago has served to maintain our individual freedoms from tyranny by the government. □

Power

The Concept of Power/Grades k-6

Carol Roach

Susan Wise

Almost any legal concept can be taught to young children if one has a certain amount of imagination and a basic understanding of how they think and relate to others in their daily lives. However, in considering the most pervading concepts—those of power, justice, liberty, property, diversity, responsibility and privacy—*power* might at first seem the most difficult to present. Perhaps that is because, to a young child, it seems most in contradiction with the other concepts. To a youngster, justice—or fairness—is most important. How can justice be accomplished if one person is more powerful than another? Power implies control over others; therefore how can the "others" enjoy freedom, diversity, or the right to privacy? (These same questions are often asked by adults.)

And yet, of all the concepts named above, power is the one first and most often experienced by children. Power comes to them in the form of authority, and the younger they are, the more often they encounter authority. What is important in presenting this concept to youngsters is not just to see to it that they understand what power means, but to help them understand its place along with the other concepts; with power comes responsibility, and a need for justice, respect for property, privacy, diversity—and the liberty of others.

The following strategies were developed for teachers and can be taught over several days, but a lawyer can adapt them to a shorter time frame (i.e., one class period) by focusing on fewer facets of the suggested material.

These strategies can be used with students in any elementary school grade level (k-6) by simply adjusting the degree of thoroughness expected at each level. For example, with kindergarten or first grade students, ask only the simplest of the recommended questions; with fifth or sixth grade students, ask more complicated hypothetical questions to encourage higher level thinking. In some instances, specific recommendations are given for adjusting to the appropriate grade level.

Strategies

One of the simplest strategies for presenting this concept to children is to talk about "Who's in Charge," and just what that "privilege" entails. The number of class periods needed will vary, depending on the ages and maturity of the students.

1. Start by asking the students to name the various *places* where they might be on a typical school and/or

weekend day. List these places on the chalkboard or a piece of chart paper. All ages of students, but the youngest in particular, will find this interesting in itself. One child will find comfort in knowing that she is not the only one who goes to a babysitter after school. Another will feel proud to announce that he goes to McDonald's for breakfast with dad most mornings. Still others will be anxious to report to mom and dad that "everyone else" in my class goes to the movie on weekends. The concept of *diversity* can be incidentally presented in this lesson. We almost always start out and end up at our homes, yet what we do and where we go in between varies according to our circumstances. We all have and do things alike, yet we are special because of the things we have and do differently. (For very young children—kindergarten or first grade—this introduction would be enough for one day. Older children could be guided through the next step.)

2. Once the list has been completed, discussed, and compared, ask students to name *rules* that apply to each of the places on the list. What are some of the rules in your home? (Diversity once again.) What are the rules at school? Are there rules at McDonald's? The babysitter's? The movie theater, the grocery store, church? Then ask, "Who's in charge in this particular place? Who sees to it that the rules are followed?" For some of the places named, the answers will vary. For example, at home—it may depend on the particular child and the time of day. Perhaps for a while it is a babysitter or an older sibling; eventually and ultimately it is the parent(s). In a store, it may first be the clerk, followed by a manager and/or the store owner. But even the youngest children will have ready answers; they have been taught to recognize those in authority at an early age. (This same strategy can be taken even farther with middle and upper elementary students. Who's in charge of our community, our state, our nation?)
3. Continue the lesson by asking students what they like or dislike about "people in charge." The concept of justice will surface immediately, because while children do want guidance and rules—authority—in their lives, they also want fairness. They want courtesy—a respect for themselves and others as individuals, for their freedoms, their privacy, and their properties. Guide the discussion to include the responsibilities of the person in charge, and the difficulties that person may face in trying to provide those courtesies and at the same time enforce the rules. What makes those tasks easy; what makes them a challenge? What are *our* responsibilities in each situation? Follow the discussion with role-playing situations (a to f are recommended for primary grade students; g to j are more suitable for intermediate grade students). Sample situations follow; give instructions to each participant privately:
   a) One child plays the teacher. Three children play students who get out lots of supplies (or toys) and forget to put them away.
   b) One child plays the role of department store clerk. Two children need help finding the sizes on some articles of clothing for sale.
   c) One child plays the manager of a movie theater. Have four or six children sit in rows of two chairs each. Put the tallest children in the front seats (or have them sit on books to appear taller) and perhaps even put a big hat on one. Seat the shortest child behind the one with the big hat. Or, have some of the children be noisy, while others are trying to "listen to the movie."
   d) Have one child play a police officer. Have several children be moving vehicles, and several others be children trying to cross the street. This has lots of possibilities: one child could try to cross in the wrong place; one vehicle could go too fast or neglect to stop; all participants could demonstrate proper procedures, etc.
   e) One child plays the role of a parent. Two others play siblings who want to play with the same toy.
   f) Two children play the roles of preschoolers who are playing ball in the front yard. Another child plays the role of babysitter. The preschoolers repeatedly throw the ball into the street.
   g) One child plays the teacher leading the class down a hallway. Others play students in the line; one child leaves the line and runs ahead and outside.
   h) One child plays a librarian. Another plays a child returning a damaged book. (Follow-up: how would this be different if the child were two years old, or ten years old?)
   i) One child plays a lifeguard at a swimming pool. Several others play swimmers, and one repeatedly tries to "dunk" another. After the lifeguard tells the child to stop, the child should continue anyway.
   j) One child plays a clerk in a grocery store. Three children play "customers;" while two distract the clerk, the third puts something into a pocket and tries to leave without paying.

   After each role-playing situation, discuss the *responsibilities* of the person in charge, and of the other people represented in the situation. Were the people in charge courteous? What about the others—did they respond in a courteous manner?
4. With older children, you can also discuss how the people in charge get their authority, or power. Is it due to circumstance? (parent/child) Are these people appointed or elected? What happens if they do not fulfill their responsibilities, or they misuse their positions of authority (power)?
5. Make a "Who's in Charge?" chart or bulletin board for classroom helpers. Be sure that numerous duties include interaction of students. For example:
   a) a helper who distributes paper and other supplies to the rest of the class
   b) someone to call the children to line up and/or to supervise the line in the hallways
   c) someone to distribute the playground equipment
   d) someone who (at a cue from the teacher) tells the class when it's time to put away particular subject material and what to get out next.
6. The concept of power can also be discussed with children in terms of "bullies." Almost every child has either actually experienced or imagined/feared the experience of being bullied by an older and/or bigger child. Children can be encouraged to express their feelings and to again discuss rights and

responsibilities. Does being bigger give one the right to bully someone smaller? What responsibilities come with size and age? Does larger necessarily mean more powerful? (There is an excellent film for young children about a boy who fears a bully and is guided to speak up rather than keep quiet in fear. It also teaches children how to say "no" and "tell" when faced with sexual abuse. ["What Tadoo" produced by the J. Gary Mitchell Film Company.])

The Use of Children's Literature

There are also lots of children's stories that can be used to help illustrate the concept of power or authority. Some suggestions for primary grade students follow; examples of questions to use with the story are included with the first suggestion.

The 500 Hats of Bartholomew Cubbins by Dr. Suess. The Vanguard Press, 1938. Synopsis: Bartholomew tries to remove his hat to show respect for the king, but every time he takes it off, another hat appears. He is seized and taken to the castle where everyone in a position of authority tries to make him obey. He is sentenced to be executed, but even the executioner fails because Bartholomew can't remove his hat. The 500th hat is finally the last one, and it so appeals to the king, that Bartholomew is favored instead of persecuted.

1. What responsibility did Bartholomew have to his family? (To take the cranberries to market and bring home money.)
2. Who was in charge of the Kingdom of Didd? (King Derwin)
3. What responsibilities did Bartholomew have to the king? Why? (To remove his hat; to show respect)
4. At the castle, who were some of the other people in charge and what areas were they in charge of? (Sir Alaric, the king's records; Sir Snipps, making hats; the Wise Men, knowledge; the Grand Duke of Wilfred, whatever he wanted to be in charge of; Yeoman the Bowman, archery; Magicians, magic; the Executioner, executions. The king was in charge of everyone in all areas.)
5. Which of those people handled things fairly; who did not? Why do you think that? (Opinions)

Follow-up: cut wide strips of construction paper and staple them to make headbands as hats. Have students make up specific situations that would occur throughout the day when they should remove their "hats." What will happen if they forget? Who will be in charge? Do the activity numerous times, changing the rules and/or the roles played.

Miss Nelson Is Missing by Harry Allard and James Marshall. Houghton Mifflin Co., 1977. Synopsis: Miss Nelson is the nicest teacher in school, but her students won't cooperate. One day a substitute teacher comes instead of Miss Nelson. She looks like a witch and is very mean. The children want Miss Nelson back, but she is missing. When she finally reappears, the children are so glad to have her back, they are wonderful students.

We Never Get to Do Anything by Martha Alexander. The Dial Press, 1970. Synopsis: Adam wants to go swimming; his mother says no. He tries all kinds of tricks to get away and go swimming, but his mother always catches him and "gets her way." At the end, it rains and he builds a pool in his sandbox.

The Youngest Captain by Jay Williams. Parents' Magazine Press, 1972. Synopsis: The Appel family has a boat and Mr. and Mrs. Appel take turns being the captain or the crew. Young Pim must always be a passenger. When he asks when *he* can be the captain, his father always says, "someday." Pim finds a shallow pond, which in his imagination becomes a lake. A table is turned into a boat; a friend becomes his passenger—and off they go. In Pim's wonderful imagination, they sail around the world, and he handles every emergency they encounter. When he tells his father all about it, his father decides that "someday" has arrived and Pim gets to steer the real boat.

Noisy Nancy Norris by Lou Ann Gaeddert. Doubleday & Co., 1965. Synopsis: Nancy is noisy all of the time. She lives in an apartment house and her noises often disturb her neighbors. When faced with the possibility of having to move because of her noise, she learns the right times and places to be noisy, and the pleasure of being a good neighbor.

Martha Ann and the Mother Store by Nathaniel Charnley and Betty Jo Charnley. Harcourt Brace Jovanovich, Inc., 1973. Synopsis: When Martha Ann's mother makes her put away her toys, clean her shoes, and go to bed early at night, Martha Ann decides she wants a new mother. So she and her mother go to the Mother Store for a replacement; she leaves her mother there and takes four others home (one at a time). However, there is something wrong with each of them and Martha Ann decides she wants her own mother back. When they return home, they discuss the rules. Some compromises are made, but most rules are not changed because they were made for a good reason.

When I Have a Daughter or *When I Have a Son* by Charlotte Zolotow. Harper and Row, 1965 and 1967. Synopses: In these two stories, a girl and a boy list all the things they will someday allow their daughter/son to do, and the things they will not restrict them from doing. Obviously the lists reflect the rules the girl and boy must follow, but wish they could change. After reading either story, students could discuss the merits/faults of the rules and/or make their own lists of what they would expect of their children someday.

Move Over, Twerp by Martha Alexander. Dial Press Books, 1981. Synopsis: When a little boy rides the school bus for the first time, he encounters a bully who won't let him sit where he chooses. After several days of worry and frustration, he solves his problem in a creative way.

Note: Other examples of children's stories that can be used in the presentation of law-related lessons are found in each edition of *Life/Liberty/Law,* the Kansas series of teacher guides for law-related education. Contact the author for further information about these guides.

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Power

Legislators, Police Officers, and Judges/4th and 5th grades — Utah Elementary LRE Program

Objectives

This activity would be appropriate for a lawyer, judge or government official. It will take one to two hours and help students place public officials into three categories:

a. Rule-makers – The Legislative Branch
b. Rule-enforcers – The Executive Branch
c. Rule-appliers – The Judicial Branch

Procedure for Lesson on Legal System

1. Distribute the handout – "He Does It All!" Read it as a role play with a student narrator and two other students reading the "officer" and "you" parts.
2. What did the officer do? (He *made* a new law, he *enforced* his new law, he *applied* his law.) Could this happen in the United States? (Not legally.)
3. The resource person can discuss how the legal system works in this country. How is power is divided within the system? What is the role of the police officer? What happens *after* the officer makes an arrest? What is his role in a trial? What is the role of the lawyers on either side? The role of the judge? the jury? Who makes the law that the police officer enforces? Examples from actual cases or a walk-through of a typical case would be helpful.

Procedure for Separation of Powers Lesson

Begin with steps one and two from above. Then:

1. Explain about the separated powers of government:
   - *Legislative*
     Who works there: Senators in the Senate; Representatives in the House of Representatives. Explain that the Senate and House make up *Congress*.
     What they do: make, change and repeal laws.
   - *Executive*
     Who works there: president, vice president, cabinet members and people who work in departments and agencies. What they do: carry out laws. The federal agencies and departments make federal regulations and see that laws are enforced.
   - *Judicial*
     Who works there: Supreme Court justices and federal judges. What they do: interpret and define what laws mean in specific cases. Determine if any laws go against the Constitution.
2. Using pictures of national leaders and the chalkboard, try to place the public officials into the legislative, executive, and judicial categories.
3. Give each student: copy of a summary of the Constitution, pencil or crayons, and paper.

Handout: He Does It All!

(A Make-Believe Tale of the Future)

It's a beautiful April afternoon. You've just arrived home from school. Even before you get through the front door, your mother meets you with an armload of books. "Take these books back to the library, would you please? We've got to get them back today, or they'll be overdue." She then adds the magic words, "You may take the car, if you wish." Hey, that's all right! You just got your driver's license. Off you go.

When you come back to the car after dropping the books in the book drop, a police officer is standing by your car. Good grief, what could be wrong? He hands you a ticket! (With your new driver's license, you had been really careful. You were in a parallel parking place, just the right distance from the curb, and you had checked carefully for "No Parking" signs.)

"What did I do wrong, officer?" you ask. Then this dialogue takes place:

OFFICER: "You can't park here."
YOU: "But there isn't a 'No Parking' sign."
OFFICER: "I just made it no parking."
YOU: "But you can't do that!"
OFFICER: "I can now. You're under arrest."
YOU: "Arrest? How can I be under arrest when I didn't break a law?"
OFFICER: "You did break a law; my law. You are under arrest."
YOU: "What happens now?"
OFFICER: "I try you."
YOU: "Try me! You're not a judge!"
OFFICER: "I am now. You're guilty. I fine you $25.00 and costs."
YOU: "Twenty-five dollars and costs! How much are the costs?"
OFFICER: "Another $25.00."
YOU: "But, I'm not guilty!"
OFFICER: "Pay me."

This make-believe officer did it all! What did he do?

1. _____
2. _____
3. _____

Would this happen in the United States?
Explain:

4. On the chalkboard, draw the trunk of a tree and write, "U.S. Constitution" on or by it. Also write, "Three Branches of Government" at the top of the chalkboard. (Have students do the same.)
5. Have students read Article I or read it with them and have them decide how they would title the article. Draw a branch on your tree and label it, "Legislative or Congress" and put a I (one) on this branch. Discuss with students the main points in the Article I.
6. Follow the same procedure for the next two Articles, labeling the branches: II, Executive or President, and III, Judicial or Judges.
7. Review with students the title of each article, comparing them to the three branches they drew on their paper.
8. Summarize by stressing the names of the three branches, their functions, the concept of separation of powers and why this concept is essential to our form of government.

Going Further

A follow-up activity will provide more meaning to the first two articles of the Constitution.

1. Have students look at Articles I and II (one at a time) in their summary and tell you what the requirements are to run for each office. Write these on the chalkboard:

House of Representatives
Serve for 2 years
At least 25 years old
Citizen of U.S. for 7 years

Senate
Serve for 6 years
At least 30 years old
Citizen of U.S. for 9 years

President
Serve for 4 years
At least 35 years old
Born in U.S.

2. Have students decide which office they would run for and then describe themselves so they fit the requirements as established in the Constitution. As they finish, "candidates" could read their descriptions to the rest of the class. The class could then decide if the requirements meet those set up in the Constitution.

Taken from the Utah Law-Related Education Elementary Lesson Plan Book, *with additional activities by Mary Lou Crane, a sixth grade teacher at Oquirrh Hills Elementary School in Kearns, Utah.*

Power

The Presidency/Grades 4-6 — **Connie Yeaton and Karen Braechel**

This separation of powers lesson is designed primarily for fourth graders. It will help these students understand the role and responsibility of the president.

Objectives

Students will be able to:

1. State that the presidency is in the executive branch.
2. Deduce that the presidency has limited powers.
3. Identify the current president by locating pictures in the newspaper.

Background

The Constitutional Convention was a series of compromises, with the decision on the executive branch being one of the most important.

The Articles of Confederation lacked executive power. This led to many problems. A president served as chairman during meetings of Congress, but had no power to enforce decisions.

Some states favored one person in the executive branch with very limited powers. They did not want to return to being ruled by a king. Other states preferred one person as executive with strong power in order to be an effective leader rather than a figurehead. A third group felt that no single person could be trusted to serve in the executive branch. It was even suggested that three men representing various sections of the country could best serve the people without becoming too powerful.

Procedure

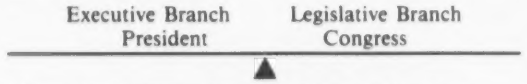
1. Distribute copies of "Miller School Student Council" handout. If appropriate for your students' ability and grade level, read the material with your class. Otherwise, have class read silently.
2. Say: "As we read the story about the Miller School Student Council, try to pick out situations which may be problems. Keep in mind the idea of fairness."
3. Discuss the questions at the bottom of the "Miller School Student Council" handout.
   Question: What problems were mentioned?
   Answer: Sally insisted everyone would go to the museum. Sally insisted everyone sell candy instead of T-shirts. No one would complain because Sally was on the committee. Sally set the price of the candy too high. Parents and students complained about the price. No field trip could be taken unless money was raised.
   Question: Who was causing the problems?
   Answer: Sally.
   Question: Why did Sally cause problems for the student council?
   Answer: She had too much power.
   Question: What could be done to change the situation?
   Answer: Limit her power in the committee. Make her a non-voting member.
4. Ask: "Have you ever met someone like Sally?"
   "What is wrong with someone having all the power to make decisions for a group?"
   "What would be a way to keep a person from having too much power?"

5. Explain that the writers of the Constitution knew that a national leader was needed if the new country was to survive. Without a leader, states were each "doing their own thing" by making money, following the laws each chose, and deciding whether or not to supply troops for the army. A leader was needed, but the people were unhappy with the idea of being ruled by a king, as in England. Some felt *one* man should be in control with very little power. George Washington and several important men felt the new ruler had to have strong power in order to control the states. It was even suggested there should be *three* people instead of one as president.

   After much discussion, a compromise was reached. What is a compromise? (A compromise is using part of each idea to come up with a completely new idea.)

   It was decided to have one president with enough power to enforce the laws, but with the power limited by Congress. What is Congress? (Congress is a group of men and women selected by the voters to make laws for the United States.)

   To make sure that Congress did not become too powerful, the writers of the Constitution gave the president the power to veto, or say "no," to a law. In this way, the responsibilities of leading the country were shared between the president and Congress. We could picture the power as a teeter-totter.
6. Draw on chalkboard.



7. If one side becomes too powerful and causes an imbalance, the other side must take away some of the power to make things balanced again.
8. The president and members of Congress make decisions daily that have an effect upon the way we live in the United States.
   What is the name of the president?
   Who was the first president?
   Who are some other presidents in our history?
   Do you know the name of any congressmen?
   Do we have any congresswomen from our state?
9. Distribute copies of the newspaper.
   Ask students to look through the newspaper and find pictures, articles, or cartoons showing the president and members of Congress. If you want to find a cartoon showing the president or other people from the federal government, where would you look? (Editorial page.) Underline the names of congressmen or the president.
10. Give students time to complete the activity.
11. Allow students to share their pictures and cartoons. Make a bulletin board using these.

Extension Activities

As a class or individuals, write a letter to the president about a particular concern.

Write a report on a specific president. Choose one born in the same state as you were, one with the same last initial as yours, or one born in a place you'd like to visit.

Make a chart of the presidents used on various coins and currency.

Miller School Student Council Handout

Directions: Read the story below. Then answer the questions that follow on a separate piece of paper.

Sally French was the most popular girl at Miller School. She loved to be in control. Each school year, teachers were asked to select a student from the class to be a member of the student council. The council discussed problems, special projects, and ways to raise money for field trips.

During the first meeting of the year, officers of the student council were elected. Sally was voted president. Council members served on the complaint, the special projects, and the funding committees. As president, Sally was expected to be a member of each committee. Everything seemed to be working smoothly until October.

Sally's favorite trip was to the "Haunted House" at the Children's Museum. When the special projects committee met to decide between visiting the zoo or the Children's Museum, Sally insisted that no one would enjoy the zoo and she would not attend if the committee voted for it. Since everyone wanted to be Sally's friend, the committee voted for the Children's Museum.

When the funding committee met to decide on ways to raise the money for the trip, Sally suggested that the school sell her favorite candy. Eric wanted to sell T-shirts. Sally told the girls that she would not play with them at recess if they voted for Eric's idea. The committee voted to sell candy.

When the complaint committee met, no one wanted to mention Sally's habit of forcing her ideas upon the group since Sally was sitting on the committee. No one wanted to be her enemy.

The candy-bar company suggested the school charge $1.00 for each bar, but Sally insisted that they sell for $3.00 so the school could have more money. Parents complained about the high price and the students were upset because they could not sell the expensive candy. The fall field trip for Miller School would be canceled unless something happened soon!

Questions:

1. What problems were mentioned in the story?
2. Who was causing the problems?
3. Why did Sally cause problems for the student council?
4. What could be done to change the situation?

This article is taken from A Salute to Our Constitution and the Bill of Rights: 200 Years of American Freedom *which was created by Connie Yeaton, law-related education coordinator for the Indiana State Bar Association, and Karen Braeckel, newspaper in education consultant for* The Indianapolis Star *and* The Indianapolis News.

Power

Authority/Grades 7-9 **Law in a Free Society**

Slug Signorino

This lesson is designed to help students recognize the philosophical principle embodied in the Constitution that the consent of the governed is the ultimate source of authority in our political system. Students will understand that the people delegate authority to the government to carry out certain functions. This delegation of authority gives people in government the duty and right, with certain limitations, to direct and control the actions of others through law. Students will further understand that this principle does not imply that consent is required for each action of the government, but rather that the underlying notion of consent helped shape the basic structure of our government.

The first part of the lesson explores briefly the meaning of the consent "authority." Then, through reading and discussion of the Mayflower Compact, an adaptation from John Locke, the Declaration of Independence, and the Preamble to the Constitution, students will understand that governmental authority derives from the consent of the people.

Procedure

Write the words "power" and "authority" on the board. Explain to students that in this lesson they will be exploring the source of our government's authority. Explain that power and authority both occur when someone controls or directs the actions of others. The difference between them is that authority is the exercise of power that is granted by the right of custom, law, or principle of morality. For example, when the driver of a car comes to a stop at a red traffic light, that is an example of authority because the law directs the driver to stop at a red light.

Next, ask students to read the introduction, "What Is Authority?" and to do the exercise which follows. Conduct a class discussion on their responses.

Ask students to read the "Mayflower Compact" and conduct a class discussion on the questions which follow. Students should recognize that the new government created under the compact directed the lives of those in the colony and the source of its authority was the consent of those who contracted to obey because they thought it was in the best interests of the group.

Next, have students read "An Adaptation from *Two Treatises of Government*" by John Locke. As they read they should look for problems which Locke says would arise if there were no govenmental authority. Conduct a discussion in which students identify these problems.

Divide the class into groups of three or four students. Assign each group the selection "The Source of Authority of the United States Govenment." Have each group respond to the questions and debrief by conducting a class discussion.

Student Handout 1: What Is Authority?

This lesson is about authority and our government. You probably know quite a bit about authority from your experiences. You see it in action every day.

When you talk about rules, you are talking about authority. When you wonder whether someone has the right to tell you what to do, you are thinking about authority. Authority has to do with rules and with people who sometimes have the right to tell others what to do.

When does someone have the right to tell you what to do? Do your parents have the right to tell you when you have to be home? Does the government have a right to say you can't drive a car until you are sixteen? Where does the government get this authority?

Questions of authority are often difficult. First, we should try to figure out exactly what authority is and how it should be used. The following examples should help you learn to consider authority more carefully.

AUTHORITY OR POWER WITHOUT AUTHORITY?

Directions: As you read the statements below, decide which are examples of authority and which are examples of power without authority.

1. Judge Alvarez places Maggie on probation.
2. Ralph Wingo tells Marty Krinsky to stay away from his girl or Ralph will "take care of him."
3. Max Oliver tells his daughter, Linda, that she will have to stay home all weekend because she stayed out too late on Tuesday.
4. A ninth-grade student tells a group of seventh-grade students not to sit on the school lawn. He says it is reserved for those who are about to graduate, but he knows that isn't true.
5. The U.S. Congress passes a law to control pollution.
6. A woman who runs an illegal gambling house tells a customer to pay his debt or it might mean trouble.
7. A man in a movie theater tells the two girls sitting next to him to get out because they are making too much noise.
8. The vice-principal takes a knife away from a student and then turns him over to the police.

WHAT DO YOU THINK?

1. What is power?
2. What is authority?
3. For each example of authority, how did that person get authority?
4. How does authority differ from power?

Student Handout 2: The Mayflower Compact

Now let's consider the question, "where does government get its authority?" Read the following selection about a document with which you are already familiar, the Mayflower Compact.

The passengers on the Mayflower landed at a place that was outside the jurisdiction of the Virginia Company, which had paid for the trip. Because they were at a place where the authority of the Old World did not apply, the Pilgrims decided they should govern themselves. They drew up an agreement which was signed by the forty-one men aboard the ship. By the terms of this agreement, the Pilgrims agreed to govern themselves.

In the Mayflower Compact, the Pilgrims decided that "there should be an agreement that we should combine together in one body, and submit to such government and governors as we should by common consent agree to make and choose." They agreed that it was best "to combine together into a civil body politic" which would create laws, constitutions, acts, and offices that were thought by all to be for the general good of the colony. The Pilgrims agreed to follow and obey this authority, which they had created by their mutual consent.

WHAT DO YOU THINK?

1. In what way can the Mayflower Compact be considered an example of authority?
2. What was the source of the authority of the Mayflower Compact?
3. What appears to be the belief underlying the Mayflower Compact about the source of a government's authority?

Student Handout 3: An Adaptation of John Locke

Other people, too, have thought about the question of authority. They have thought about the question, "Why do we have government and from where does it get its authority?" Below is an excerpt from John Locke, an English philosopher during the 1600s. In this essay, John Locke talks about life in the state of nature, an imaginary condition in which people live together without government. As you read this essay, think about the problems which Locke says might be likely to happen if there were no governmental authority.

People are free in the state of nature. But why do they give up this freedom and subject themselves to the authority of government? The answer to this question is obvious: In the state of nature the enjoyment of freedom is very uncertain. People are always open to attacks from others. Life is dangerous and full of fear. That is why people seek out other people who have an interest in joining together. They do so in an effort to protect their lives, their liberty, and their property.

In the state of nature there are many things missing. First, there is no established system of law which all people have agreed upon and which all people know. And since there is no law, there is no standard of right and wrong which can be used to settle disagreements between people. Second, there is no judge with the authority to settle arguments. And third, there is no person or group of people who have the authority to enforce the law.

So then, this is why people join together under the protection of the authority of government. This is why every person agrees that punishment shall be administered according to the system of rules which the community has agreed upon. This is the source of governmental authority.

WHAT DO YOU THINK?

1. According to Locke, what problem would happen if there were no governmental authority?
2. According to Locke, what should be the source of governmental authority?

Student Handout 4: The Source of Authority of the United States Government

Now, let's think about why we have government and where our government gets its authority. As you read the following excerpts from the Declaration of Independence and the Constitution, try to find answers to the questions that follow.

THE DECLARATION OF INDEPENDENCE

In Congress, July 4, 1776: The Unanimous Declaration of the Thirteen United States of America

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any form of Government becomes destructive of these ends it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their Safety and Happiness.

PREAMBLE TO THE CONSTITUTION OF THE UNITED STATES

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Transquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

WHAT DO YOU THINK?

1. According to the Declaration of Independence, why do we have government and where does our government get its authority?
2. According to the Preamble to the Constitution, why do we have government and where does our government get its authority?

Some Final Questions

1. How might the Mayflower Compact and the thinking of John Locke have influenced our ideas about government?
2. What does it mean to say that the consent of the governed is the source of authority for our government?
3. List some examples of how government authority affects your daily activities.

This lesson on the Constitution of the United States is adapted from materials developed by the Center for Civic Education/Law in a Free Society.

Separation of Powers

The Tides of Power/Secondary **Joseph Daly**

This activity began as a presentation for freshman legislators of the Minnesota House. The idea was that these men and women, many of whom are not trained in the law, might be in need of some extra help in understanding our constitutional form of government. I wondered whether the approach I decided to take—complete with simple action demonstrations—would work with these adults, but it turned out that they were very receptive. With a few variations, the approach would work well with high school youngsters too.

Objective

To show the sources of power under our federal and state systems of government. Specifically, 1) to provide a visual demonstration of how power is divided under our system of government, 2) to look at the U.S. and state constitutions, and 3) to highlight the role of the citizen in making democracy work.

Method

Begin by discussing power. What is it? Where does it come from? Answers will (and should) vary considerably, but probably they'll acknowledge that "power" is bound up with notions of control, authority, and ability to act. It's closely allied to "right," since, as one court put it, "the distinction between *power* and *right* in law is very shadowy and insubstantial. He who has a legal power to do anything has the legal right" to take action or not take action. (*State v. Koch,* 85 P. 272, 274).

Originally, most societies thought that political power came from God. Theories of divine right (power) held that God was the repository of all power, and that the king was His agent and the vessel for God's power on earth. The king, in turn, might share some of that power with noblemen who were subordinate to the crown.

You can get this idea of power across visually. Fill a large bowl or bucket with water. This represents God's power. Now pour some of it into a smaller vessel (representing the king), and then pour some of it from the smaller vessel to glasses, representing the lords, barons, knights and others to whom the king could grant power.

Ask students what kind of social and governmental organization this kind of thinking about power will produce. (Answers will probably stress a hierarchical society, in which each person has a precisely marked status depending upon how close or distant he is from the source of power. Slavery is a logical extention of this kind of thinking.)

PEOPLE POWER

Now ask students to think about power in a different way. What would happen if you turned the old system upside down? Instead of power coming from God to the king and then to the nobles, with no power to the people, what would happen if power came directly from God to the people, and they gave up some of it to form a government?

"We the people" are the first words in the Constitution. Similar sentiments in the Declaration of Independence also expressed the idea of people power:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights [the word "powers" could be substituted here]. . . that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. . .

How can we visually represent rights [powers] of which the people are "endowed by their Creator?" Pour water from a large vessel directly into a large variety of different shaped glasses, representing the people. Each glass has the same amount of water because each person is "created equally," no matter how different each is in talents or station of life. This is a truly revolutionary notion. Imagine, each person pursuing his *own* happiness.

An even more revolutionary notion is that each person has the ability to grant power to the government. To show this, pour some water from each glass into a medium-sized bowl, to show the people giving a grant of power to each state. (Make sure, however, that the glasses remain more than half full.) Why? People gave some power to the state in which they resided for police protection. They had

to protect their safety and happiness through some form of government. But what happens when this—or any other—form of government becomes destructive of these ends, becomes destructive of life, liberty, and the pursuit of happiness? It is then the right—the power—of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles and organizing its powers in such form, as *to them* shall seem most likely to bring about their safety and happiness.

Our forefathers had the dream that people power could work, but they had had all too much experience with the reality of abusive power. They knew very well that government traditionally was centralized, highly structured, and dispensed power from the top down. In their first attempts to establish a government, they took great pains to limit the power they gave even to a government of their own making.

THE ARTICLES

Pour some of the water from the glasses into a number of different size bowls representing different states and different powers given to the states. This illustrates the concept of sovereign states given limited power by the people.

Soon the states and the people realized they needed some limited form of centralization to deal with problems. Why? The Declaration of Independence in 1776 and the war with England were carried out by a loose confederation of the states. This confederation was more like the United Nations than a national government. According to one of the Articles of Confederation, "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Confederation expressly delegated."

Under the Articles, a very limited power was given by the states to a loose confederation which was the closest we came to a centralized government of the United States. For example:

1. The federal government was to raise an army to fight England.
2. The federal government was to settle disputes between the states.
3. The federal government was to assure that people could travel from one state to another.
4. The federal government was to attempt to centrally regulate the movement of commerce from one state to another.

Pour some water from each state bowl into a *very small* bowl (represents the federal government under the Articles of Confederation).

The primary tenet of the Articles of Confederation was that the *states* were agreeing that the central government was dependent and essentially impotent. Each *state* surrendered only a certain few of its powers to the new federal government.

Problems with the Articles of Confederation:

- Congress couldn't regulate and control land areas and free trade (e.g., Virginia claimed land from sea to sea, including part of Minnesota)
- The U.S. was unable to deal with a Canadian breach of a fur trade treaty
- The U.S. was unable to conclude commercial agreements with other nations
- Nobody would honor federal paper money
- Diplomats of the U.S. were not recognized by other governments

So on May 25, 1787, a Constitutional Convention was called for by the weak Congress set up under the Articles of Confederation. Why? To deal with the problem of having such a weak federal government. However, opinion was divided about what the convention was to do. According to Alexander Hamilton, one of those pressing for sweeping changes, it was "to devise further provisions as shall appear to the delegates necessary to render the Constitution of the Federal government adequate to the exigencies of the Union."

But the sole purpose, according to Congress, was to revise the Articles of Confederation. As we all know, the convention went much farther than that.

A NEW START

The opening paragraph of the new Constitution began "We the People of the United States." Ask students to look at the U.S. Constitution and read the first sentence. Ask: Who gave the power to this new form of government?

We've already seen that the Articles of Confederation took a very small amount of power from *the states* and set up a weak central government. The framers realized that the central government had to be more powerful. Get a bigger bowl, which represents the new federal government under the new Constitution. It necessarily must be bigger than the essentially impotent federal government under the Articles of Confederation.

Then ask: Where does the power come from for this new federal government? Does it come from the states? From the people? Or from both? Pour a little water from each state bowl into the bigger bowl. Pour some water from each glass into the bigger bowl. Ask where does the power of the federal government come from. From the people, Justice Marshall said in 1819, looking at the federal power under the Constitution. In *McCulloch v. Maryland,* 4 L Ed 579, Marshall wrote, "The people not the states gave life and power to the new government."

Then ask whether each state has the same amount of power as every other state, or if some states have more power? In relation to each other? In relation to the federal government? Compare the amount of power each state has (e.g., number of people, amount of resources, size of state).

The bowls of water can illustrate the questions you are asking. For example, when asking if each state has the same amount of power, hold up a big bowl with water and a little bowl with water. If the big bowl represents Texas, the little bowl represents Minnesota, and water represents power—is power a function of population, or wealth, or natural resources? Do some states have more of these than others? That's one kind of power. Then ask if each state is equal in power in relation to the federal government. That's another kind of power.

Then pass out a U.S. Constitution and look at specific powers given in it to the federal government and the states. Look at a general outline of the Constitution (i.e., the articles and amendments in very general form).

- Go to Article 1, Section 8, to show how the commerce clause and the general welfare clause have a lot to do with states
- Go to Article IV and show how the Constitution protects states against domestic violence

- Then gradually go through the Constitution, making sure to show how Article I created the Congress; Article II, the Presidency, and Article III, the Judiciary.

If you wish, you can go to your state constitution for a quick run-through. Ours in Minnesota is very much like the federal Constitution in both the sources of governmental power and separation of power:

- Preamble: "We the People" do ordain and establish the constitution
- Article I – the very first article in the Minnesota Constitution – specifies that all political power is inherent in the people
- Article III (distribution of powers of government) establishes three branches. "No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others."

No doubt your own state constitution could be the basis of a similar exercise.

DIVIDING AND CONQUERING

The American system of government was revolutionary at the time. In many ways, it still is. Separation of powers and checks and balances have been adopted by very few governments around the world. To many foreign observers – and some domestic ones – our quaint 18th-century mechanisms to forestall tyranny are about as useful in the modern world as spinning wheels.

"It is the kind of system that must give efficiency experts fits," says Professor Rex Lee. "The only way to construct a system that would be more inefficient, even in theory, would be to create more branches of government, with a further splintering of powers among them." (Actually, in theory we do have one more branch of government. As conceived by the founders, there are three branches of the federal government, but general legislative power is retained by the states. Thus one branch of the federal government makes the laws, a second branch enforces them, and a third interprets them, while a fourth branch of state governments make their own laws which must be given "full faith and credit.")

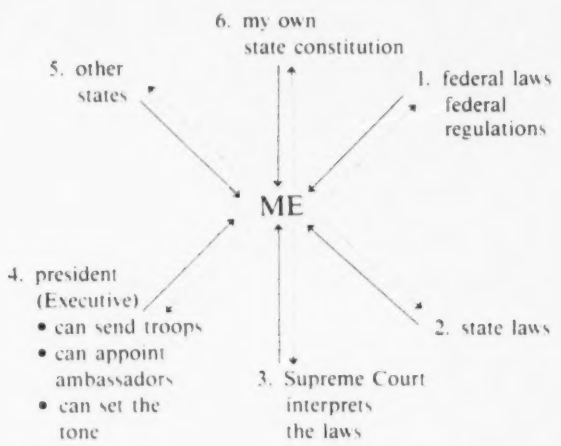
Certainly our system is inefficient, but as Rex Lee points out, "any system of government – in any country, in any century – involves a necessary choice between... efficiency, on the one hand, and checks against arbitrary exercise of governmental power on the other. It is impossible to have both." Our system is costly and time-consuming, but it has preserved individual liberties and a republican form of government for nearly 200 years.

THE ME IN ALL THIS

When I do this exercise for freshman legislators, I finish by focusing on what the federal and state constitutions say about the divisions of power and the role of legislators. For students, I finish up by asking them what all this has to do with them. How does this affect them, their lives and their power?

As the diagram shows, each of us is affected by at least six levels of government. We are all "the me in the middle." The diagram makes it look as if we are somehow caught by the system, with all of these forces impinging on us. But don't forget that the arrows go both ways. *We* are the source of power, and we impact on government.

"Me" in the middle – IMPACTS



History shows that we think "governments...derive their just power from the consent of the governed." And our Constitution is about liberty and justice for all of us – for *me*.

- separation of power exists so that no one person or group can act as a despot over me
- checks and balances exist to stop any one group from becoming despotic
- the Bill of Rights exists to protect individual freedoms
- the many entry points for citizens – voting, influencing legislators, influencing regulators, involving the courts – carry forward in the modern world the Madisonian notion of a limited majority rule sensitive to minority rights

As the demonstration shows, we retain a good deal of our power. The glasses of water which represent us and our power remain more than half full, and none of the larger vessels – state and federal – to which we've given power dominates the individual.

So the Constitution is ultimately about me, my power, and the individuals like me who voluntarily join together to create a government. As Chief Justice Burger has written, the Constitution that implemented the Declaration of Independence is a

> written document by which the people voluntarily delegated powers to a central government, organized with an ingenious system of three divided and separate departments. This mechanism provided checks and balances on governmental power which, in turn, released the creative powers of a whole people. It encouraged diversity and enterprise so they could shape their future in ways that seemed best to them.

It may not be perfect, but as Benjamin Franklin said at the end of that long summer, nearly 200 years ago, "I agree to this Constitution, with all its faults, if they are such....I doubt too whether any other Convention we can obtain may be able to make a better Constitution." For better or worse, in both crisis and calm, it has preserved our freedoms for 200 years. And it all began with a revolutionary idea about power, and the ability of men to govern themselves.

Joseph L. Daly is a professor of law at Hamline University School of Law in St. Paul, MN.

Robert S. Peck

When the Constitution Isn't Enough

The Bill of Rights guarantees a lot, but state charters sometimes guarantee even more

When David stepped onto the battlefield to face Goliath, he carried only a slingshot. That choice of arms had not occurred to other soldiers; it was a mere child's toy, not a weapon of war. When David's slingshot succeeded where arrows and spears had failed, legend was born.

In many ways, state constitutions have become the slingshots of battles taking place in the judicial arena. They are often considered quaint necessities that, to the extent they are acknowledged at all, are mere miniaturizations of the federal charter.

But today, state constitutions are being rediscovered. They're undergoing a surge of development and examination that is likely to lead to the enunciation of previously unrecognized state-based constitutional rights. We could be heading into a period of unfettered experimentation and activism among the state courts, with important ramifications for the future of constitutional law.

Warren Court Lives—In the States

Many Supreme Court watchers have characterized the Burger era as a retrenching period. Its predecessor, the Warren Court, saw its mission, in part, to champion the rights secured under the Constitution against the abuse of governmental power. When the Court was defining a previously unrecognized set of constitutional rights, state constitutions were relegated to a position of relative insignificance, ignored by lawyers and judges as subservient (if not irrelevant) to the federal Constitution. To the extent that courts, both state and federal, considered state constitutions, their analyses merely aped federal developments.

During the Warren era, constitutional cases involving civil liberties and civil rights naturally flowed to the federal bench. State courts were commonly thought hostile to the constitutional claims plaintiffs were making. In the 1961 James Madison Lecture at New York University School of Law, Justice William Brennan said, "Far too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel, and downright brutality."

To Justice Brennan, perhaps the current Court's most liberal member and one who finds himself more frequently in the minority than the majority, the abuses that once rose up from the states are now being better addressed by the state courts. Justice Brennan's view probably results from the fact that many of the state courts have picked up the Warren Court's philosophy at the same time the U.S. Supreme Court has abandoned it. Brennan accused the Court, in a speech to law students at Mercer University last fall, of having "condoned both isolated and systematic violations of civil liberties." He observed that advocates are avoiding the Court as a result.

"This increasing resort of using the state constitutions and state courts," he said, "has been accompanied by a decline in the number of cases [involving individual rights] being brought to the Supreme Court."

"During the Warren era," University of Virginia law professor A. E. Dick Howard explains, "states could hardly keep up. Today, they're simply being more active and more visible."

There is no simple explanation for the seeming role reversal of the state and

federal courts. One factor, though, may be the increasing professionalism of state court judges. Through programs like the National Judicial College in Reno, Nevada, continuing judicial education has become a major factor in familiarizing state court judges with the latest legal developments and providing an opportunity for judges from different states to share acquired wisdom.

Says Professor Howard, "There has been a coming of age of a generation of state judges who are more aware of state constitutions and because of the U.S. Supreme Court's change in direction have an opportunity to develop state constitutional claims."

"By dusting off our state constitutions," former New Hampshire Supreme Court Justice Charles G. Douglas III wrote for the *Suffolk University Law Review* in 1978, "judges can be 'activists' in the best sense of the word and breathe life into the fifty documents."

The result is that state courts, rather than those in the federal system, may be the more receptive forum for exploring new constitutional terrain. While both state and federal claims can be litigated in the state courts, the federal courts will generally not explore state constitutional requirements. As a result, more and more cases that would have gone to Washington, D.C. in the past are now headed to state courts for decisions based, in part, on state constitutional provisions. And increasingly, state supreme courts are interpreting their constitutions as providing citizens with greater protections than have been found available under the parallel federal provisions, even those provisions that are phrased identically.

New Safety Net

It may seem surprising, but there is nothing wrong with state constitutional provisions that go beyond the national provisions. It is inherent in our federal system of government that state constitutions can provide better protection in some cases than does the U.S. Constitution. The federal charter, as "the supreme law of the land," provides the safety net of constitutional rights that must be accorded to individuals. No state constitution can provide for less than the federal one does. To the extent that state constitutions provide less protection, they are superseded by the federal provisions. However, states individually have the authority to raise that net to provide for greater rights. State constitutions thus can provide more protection than the federal Constitution against governmental interference with people's lives.

State decisions can establish significant rights because state supreme court decisions based on *state* constitutional provisions are not reviewable by the U.S. Supreme Court. Just as the U.S. Supreme Court is the final arbiter of questions under the federal Constitution, state supreme courts have the last say about their constitutions. The test of whether the state decision is reviewable by the U.S. Supreme Court is whether the decision rests on grounds that are adequate to the decision reached and independent of any federal law.

The U.S. Supreme Court laid out the guidelines for reviewability in *Michigan v. Long*, 463 U.S. 1032 (1983). There, the Court reversed a state court decision that excluded evidence from a criminal trial based on considerations under both the Fourth Amendment and the Michigan Constitution. The Court determined that "when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

In *Long*, the Michigan Supreme Court determined that police conducted an unreasonable search of the defendant's car after stopping him on suspicion of drunk driving. The police were searching for weapons in the car after having spotted a hunting knife on the floorboard; they found a pouch of marijuana. The Michigan court held that protective searches under the Fourth Amendment were permissible only where there was a reasonable danger of harm to the police officers. Because the police had control of the suspect outside of his vehicle, the court determined that there was no danger to the officers. Without further analysis, the court also found the police conduct proscribed by the Michigan Constitution. The U.S. Supreme Court reversed, finding that the Fourth Amendment was misconstrued by the state court and that no clear justification for different treatment under the Michigan Constitution was articulated.

The *Long* decision clearly changed longstanding practice. Since 1890, the Court has generally deferred to state decisions when the opinion could reasonably be said to rest on a state ground, or even when the grounds for the judgment were ambiguous. In *Long*, the Court declared that only a clear statement and analysis of state law would support an adequate and independent ground. Merely coupling a state constitutional ground with its federal counterpart would no longer be sufficient.

Justice John Paul Stevens dissented, suggesting that a flood of cases like this one would reach the Court precisely because the Court had reversed the presumption in favor of adequacy and independence.

Stevens noted: "Until recently we had virtually no interest in cases of this type.... Some time during the past decade...our priorities shifted. The result is a docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens."

But according to New Hampshire's Justice Douglas, what *Long* said is "stand up and be counted." He believes state court judges have been "lazy," using the U.S. Supreme Court as an excuse. "It has often been a cop-out for some appellate judges to say that the Supreme Court has said what to do," he says. "They don't have to think the problem through *de novo*. They don't have to study the history and debate [of the state constitutional provisions]."

Professor Howard agrees. "Where the state [constitutional] provision is different – clearly not an echo – there are obvious grounds for distinguishing [the decision from federal precedents]," he said. "The burden on the state court is to advance a principled basis for its decision. Too often state courts are not too articulate. *Michigan v. Long* may oblige them to take this obligation more seriously."

"Simply because a state constitution uses the same phrase does not mean it relies on federal precedents," he adds. "They are free to make an independent choice, but must explain that choice."

New Activism

In recent years, Washington Supreme Court Justice Robert F. Utter believes, "the attention of state courts has been directed to their own constitutions as an intellectually honest way to deal with problems. There has literally been an explosion of state awareness of state constitutions."

Robert S. Peck is an attorney who directs the American Bar Association's project, We The People, *celebrating the 200th anniversary of the U.S. Constitution. A somewhat different version of this article appeared in the ABA's* Student Lawyer *magazine.*

Examples of state supreme court activism come from virtually every state, though some have emerged as leaders. One has been the New Jersey high court, which recently held that the state constitution's due process clause requires communities to permit construction of needed low-cost housing. The impact of the remedies endorsed in the innovative 1983 decision will not only affect exclusionary local zoning decisions in New Jersey but, quite possibly, land use policies throughout the nation as zoning boards consider the possibility that their courts might follow suit. It is another instance of a state court taking the lead in constitutional development. This same New Jersey court considered the first constitutional "right to die" case, *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), where it found the parents of a terminally-ill patient could terminate the extraordinary medical measures that were keeping her alive.

A Different Approach

When the state of Washington was admitted to the union a century ago, its leaders examined the U.S. Constitution closely to guide them in writing a state charter. The drafters of the state constitution specifically rejected language that would have mirrored the Fourth Amendment's prohibition against unreasonable searches and seizures in favor of an explicit right of privacy, something that the U.S. Supreme Court has said is implied in the federal Constitution but has had difficulty in justifying. A court asked to construe the Washington provision would be justified in concluding that it affords broader privacy rights than does the U.S. Constitution.

Other state constitutions similarly establish more extensive rights than does the federal document. Though its advocates have been unsuccessful in adding an equal rights amendment to the U.S. Constitution, seventeen states guarantee equal rights for women in their constitutions. The federal Constitution does not recognize education as a fundamental right; a plaintiff in a school case thus is forced to prove that an allegedly discriminatory practice furthers no rational state interest under equal protection standards set by the U.S. Supreme Court. However, since the end of the last century, the New York Constitution has guaranteed a free public school system in the state. A New York court is thus likely to give a civil rights question in the schools stricter scrutiny – requiring that the practice be necessary to carry out a compelling or overriding governmental interest – because of this constitutional provision.

Generally, state constitutions are longer and more detailed than their federal counterpart; only Vermont's is shorter. Though the federal Constitution has 26 amendments, the average state charter has over 90. As a result, issues that are the subject of statutory law at the federal level are often elevated to constitutional status in the states. Education and environmental protection are frequent examples of this phenomenom.

Many modern constitution-based understandings had their origins in the state experiences. "State supreme courts were the first to develop a number of doctrines that were later put into the cornerstones of our legal framework," Justice Utter notes. "Ten states preceded *Marbury* [*v. Madison*, 5 U.S. 137 (1803) the U.S. Supreme Court decision confirming the power of the Court to declare a statute unconstitutional]. If state courts were discouraged in analyzing and commenting on federal constitutional principles, the U.S. Supreme Court would be deprived of a rich source of analysis."

Oregon had an exclusionary rule with respect to illegally obtained evidence before the U.S. Supreme Court established the federal rule in *Weeks v. United States*, 232 U.S. 383 (1914); Wisconsin's supreme court anticipated the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), by over a century.

The state courts continue to grapple with modern constitutional dilemmas. In 1976, for example, the California Supreme Court faced a case involving whether a defendant in custody must have his rights under the Fifth and Sixth Amendments explained before he could be considered to have waived any of those rights. In *People v. Disbrow*, 16 C.3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), the court held that statements made by a suspect prior to being read his rights could not be used to impeach his testimony at trial. In doing so, the California court rejected a conflicting 1971 U.S. Supreme Court decision as "not persuasive" and relied instead on "the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens. . ." The supreme courts of Hawaii and Pennsylvania have taken similar positions on this issue.

State supreme courts often face questions of immediate concern before they have become a national trend. In that way, they must deal with certain types of issues before they might reach the U.S. Supreme Court. The decisions of the state tribunals provide a persuasive authority for other supreme courts in addressing the same issue.

That states have a different history behind the development of their constitutional provisions and different governmental interests and traditions to maintain explains how they reach different conclusions, even on similar issues. Alaska has a decision that guarantees the right of individuals to smoke marijuana at home. The decision is based on a concept of privacy and freedom that takes to heart the idea of the home as a private keep, where individualism and adventure can reign relatively free. While the Alaskan decision is not likely to be followed in very many states, it provides an example of how a state interprets its laws in terms of its unique environment and traditions.

The new attention given state constitutions has reopened old issues. Some lawyers are relitigating in state courts causes that were lost at the federal level. In 1972, for example, the U.S. Supreme Court held that the First Amendment didn't require shopping malls to permit access to citizens engaged in expressive activity. In California, the supreme court voted to allow access to malls to political expressions under the state constitution. Courts in Massachusetts and Washington have reached similar results, while Pennsylvania and New Jersey have limited their decisions to free expression at private universities, not shopping malls. The Connecticut Supreme Court and New York Court of Appeals have also found that no free speech rights exist in a mall under those states' constitutions.

Judges are sensitive to the charge that they are simply using the state constitutions to avoid undesirable U.S. Supreme Court precedents.

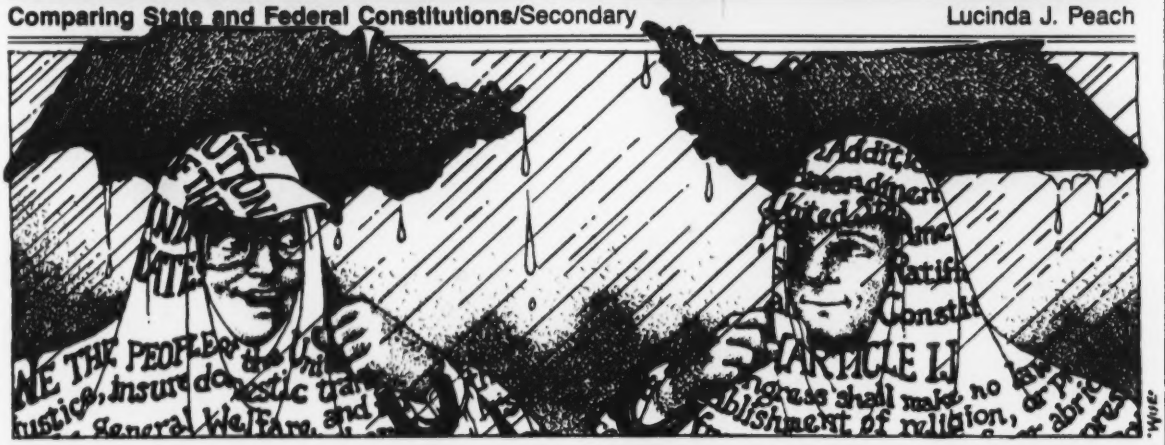
"What has happened," Utter says, "is states are examining the language of their constitutions and have a proper role in defining its meaning. This is responsible jurisprudence, not result-oriented."

The new emphasis on state constitutions may also have some unintended consequences. State constitutional changes are not as difficult to achieve as federal amendments. Many states have redrafted their constitutions within the last thirty years. In five states, constitutional amendments can be made through the initiative process.

States may *again* become the laboratories for federal amendments that have been proposed but not yet mustered the necessary support to become the law of the land. □

Power

Comparing State and Federal Constitutions/Secondary Lucinda J. Peach



Many state constitutions limit government and protect individual rights with provisions very similar, if not identical, to those in the federal Constitution. This is not surprising, since many state constitutions were modelled directly upon the federal one. As the prior article demonstrates, however, state constitutions may provide very different protections for individual rights than does the federal document. In drafting their constitutions, some states looked to the documents of their sister states as models and ignored the federal Constitution.

The Supreme Court has interpreted the U.S. Constitution to provide only the minimum—or basic floor—of individual rights. Although states cannot provide less protection than the federal Constitution guarantees, they may provide *greater* or different protections. The following activities are intended to make students aware of three important ways in which state and federal constitutions may differ and how these differences may affect individual rights:

1. In the first situation, the state constitution may contain language which expressly protects some individual right. The federal Constitution does not state that such a right exists, either expressly or by judicial interpretation. This occurs, for example, in the area of environmental protection, described below.
2. In the second situation, the state constitution may contain language which expressly protects a particular right. Although the federal Constitution does not expressly protect that right, the courts have *implied* such a right through interpretation. This situation occurs in the area of privacy, discussed below.
3. In the third situation, both the state and the federal Constitution may have provisions which guarantee a particular right, but the courts have interpreted those provisions differently. The right to distribute leaflets at shopping centers, discussed below, illustrates this difference.

Suggested Activity 1

Objective: By exploring the subject of environmental protection, students will learn that their state's constitution may provide greater protection for individual rights than does the federal Constitution.

Materials: A handout containing the Bill of Rights to the federal Constitution, as well as the provisions from state constitutions and hypothetical included in the box on page 31.

Activity

1. Have the class read the handouts.
2. Divide the class into small groups, each to be "residents" of one of the states listed on the handout and one to be residents of the nation as a whole.
3. Give each group up to twenty minutes to discuss and decide what arguments it can make up for a right to a clean and safe environment based on the provisions of the constitution they have been assigned.
4. Select a representative from each group to present their arguments to the class.
5. After the arguments have been completed, ask the class to vote on which group had the best argument.
6. Questions for a follow-up class discussion:
   a. Which constitution was the best support to argue that the chemical plant was violating the constitutional rights of citizens in the community?
   b. If you were a judge deciding this case, would you be more persuaded by arguments made under a state or the federal Constitution in favor of a right to a clean environment? Why?
   c. What are some of the costs and benefits of having specific, rather than general, constitutional rights set forth in a constitution?
   d. Can you think of any advantages or problems with general constitutional provisions, such as the Fourteenth Amendment's guarantee of "equal protection," which may not address specific situations, such as whether citizens have a right to a clean environment?
   e. Aside from constitutions, what other ways can you think of to ensure a pollution-free environment?
   f. Do you think laws other than constitutions might be better ways to ensure a clean environment? Why?

Suggested Activity 2

Objective: Students will understand that an individual's rights to privacy may be given different protection depending on whether the federal or a state constitution is used to enforce those rights.

Privacy has been defined as freedom from observation or intrusion in a person's private affairs; the right to protect certain personal information from being disclosed to others; and the freedom to act without outside interference.

1. Explain to the class that the federal Constitution does not have specific language guaranteeing a right of privacy, although the Supreme Court has interpreted it to protect privacy. Some state constitutions, by contrast, do have an express right of privacy. (These states are Alaska, California, Florida, Hawaii, Louisiana, Massachusetts, Montana, South Carolina and Washington.) The difference may have important consequences, as the following exercise will show.
2. Divide the class into small groups and have them spend five minutes or so brainstorming areas of their lives where privacy is important, like the contents of their lockers, the books they read at home, their medical records, etc. Ask someone from each group to make a list of the ideas generated.
3. Distribute the handout on page 23 describing Supreme Court rulings on the implied right of privacy under the federal Constitution and the express privacy provisions of some state constitutions.
4. After reading the handout, have the groups discuss whether they think each right on their brainstorming list would be protected by the privacy guarantee as defined by the Supreme Court rulings on the handout list, and why. Have them record their answers on the brainstorming sheet. Then have them go through the list a second time to decide whether each of the items on the list should be among those protected by the privacy rights contained in the state provisions.
5. Have each group draft a "model" privacy provision, to be implemented in their state's constitution.
6. After each group has completed its model provision, and written it on a large sheet of poster paper, pin the provisions up around the classroom.
7. Reconvene the class. Record some of the privacy rights and responses of each group's brainstorming session on the blackboard.
8. Subjects for class discussion:
   a. After reviewing the results of your work, do you think the federal Constitution is an adequate source of protection for privacy rights? If not, why not?
   b. If your state is not among those that have express constitutional protections for privacy rights, do you think it should? If your state's constitution does protect privacy, do you think it goes far enough?
   c. Discuss the similarities and differences between the model provisions. Ask members from each group to report on the reasons for certain aspects of the provisions. Ask the class which of the models best protects the privacy rights that are most important to them. Why?
   d. Discuss whether the language of a constitutional privacy provision should be very general, such as "citizens of this state have the right to privacy as well as to liberty, property, the pursuit of happiness" or define specific situations it is designed to cover, such as the right to have medical information protected from being turned over to police or the FBI? General language may be more readily interpreted by courts to cover new situations not contemplated at the time the provision was drafted. For example, the vast information-sharing possibilities created by computer technology could not have been contemplated at the time the federal Constitution was drafted, even assuming it contained an express privacy provision. On the other hand, specific provisions assure that the right in question will be applied by the courts to the specific situations the legislature determined were important.
   e. Which of the items from the brainstorming sessions are protected by the model provisions? Are some of the important privacy rights left out? If so, how could the language of the model provisions be altered to cover these rights?

Protection of the Environment

ILLINOIS (Art. XI, Section 2): "Each person has the right to a healthful environment" and "[e]ach person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation."

PENNSYLVANIA (Art. I, section 28): "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment."

VIRGINIA (Art. XI, section 1): "The General Assembly may undertake the conservation, development or utilization of natural resources, the acquisition and protection of historic sites and buildings, and the protection of the Commonwealth's atmosphere, lands, and waters from pollution, impairment, and destruction."

NEW YORK (Art. XIV, section 4): The "policy of the state shall be to conserve and protect its natural resources and scenic beauty."

RHODE ISLAND (Art. I, section 17): The people "shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values."

Hypothetical: Imagine that there is a chemical plant located near your school. The plant is polluting the environment through smokestacks which spew poisonous gas into the air and through burying toxic wastes in the ground, which have seeped into the underground wells and infected the neighborhood's drinking water. Many of the residents in the neighborhood surrounding the school have gotten sick recently and you suspect that the pollution from the plant is to blame. Complaints to local, state and federal government authorities, as well as to management of the chemical plant, have brought no response. You decide to sue the owners of the plant, as well as the county, state and federal governments, for their failure to take actions to stop futher pollution and remedy the harm that has already taken place.

f. Since your state's constitution is for the benefit of the citizens of your state, can you think of reasons why your model provision should or should not also protect non-residents of the state?

Suggested Activity 3

Objective: Students will learn that courts may interpret the same constitutional provision differently, leading to different protections.

Distribute the following information to the class in a handout. It contains constitutional provisions and case summaries.

CONSTITUTIONAL PROVISIONS

The First Amendment to the U.S. Constitution provides, in part: "Congress shall make no law...abridging the freedom of speech..."

Many state constitutions, including California's, state that its citizens "shall have freedom of speech..."

The Fifth Amendment to the U.S. Constitution provides, in part: "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation...."

CASE SUMMARIES

Lloyd v. Tanner, 407 U.S. 551 (1972). In this case, the Supreme Court decided that it is permissible under the federal Constitution for a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling does not relate to the shopping center's operations.

Pruneyard Shopping Center v. Robins, (447 U.S. 74, 1980)). This case involved a shopping center's refusal to allow a group of high school students to distribute leaflets in the mall. One Saturday afternoon, a group of students set up a card table in the corner of the shopping center's central courtyard, where they distributed pamphlets opposing a United Nations resolution against Zionism and asked passers-by to sign petitions, which were to be sent to the president and members of Congress. A security guard told them they would have to leave because the activity violated shopping center regulations prohibiting any visitor or tenant from engaging in any publicly expressive activity that is not directly related to the center's commercial purposes. The group immediately left the premises and later brought suit against the shopping center and its owner seeking the right to circulate their petitions. The Supreme Court held that, even though the First and Fourteenth amendments to the U.S. Constitution permit private shopping centers to prohibit such activities on their property, state constitutions might provide expanded rights of free speech and association.

Since the time the *Pruneyard* case was decided, California, Washington, Massachusetts, Pennsylvania and New Jersey have allowed leafletting at shopping malls and private universities. New York, Connecticut and Michigan have upheld the rights of owners to prohibit such activities on their property.

In a very recent case decided by New York's highest court, two anti-nuclear groups had been barred by security guards from distributing literature opposing the Shoreham nuclear power plant at the Smith Haven Mall in Long Island, New York. The groups had not blocked the entrances to the mall nor had they disrupted its operations. The mall had always permitted events that related to consumer interest but had uniformly barred all political activities. The court held that the free speech and assembly guarantees of the New York Constitution only protected people against government action, not restrictions imposed by private property owners. The mall was permitted to retain its ban.

ACTIVITY

1. Divide the class into small groups, and divide these in half, one-half to play the owners of shopping malls and the other to play groups wishing to distribute leaflets. Assign each group a state of residence, based on those listed in the handout above.
2. Give each side 5-10 minutes to determine their "identity" (for example, what those leafletting are protesting or concerned about; where the shopping center is located and what its reasons are for not wanting the protesters on its property are) and their arguments in favor or in opposition to allowing the leafletting.
3. Have the groups debate whether the "leafletters" should be allowed to distribute their handbills under the law of the territory in which they "reside."
4. Reconvene the class and have each group present its arguments in front of the class. Ask how they think the case would be decided under the federal Constitution and then under the constitution of the state where the group "resides." Why?
5. Questions for discussion:
   a. Which constitutions provide the greatest protection for the freedom of speech?
   b. Which consitutions provide the greatest protection for the rights of property owners?
   c. Why doesn't the federal Constitution protect the right of protesters to distribute their pamphlets in shopping centers?
   d. Should the right of free expression mean different things, depending on what constitution the guarantee is found in?
   e. Is it fair that citizens of one state have greater or lesser protection for their individual rights than citizens of another state?
   f. Should there be a difference between state and federal constitutions in the level of protection given to the same individual rights?
   g. Should the federal and state constitutions give different levels of constitutional protections to individual rights or should there just be one uniform standard given to all rights, regardless of what constitution they are found in?
   h. Should shopping centers be considered public places, which would require that they permit free expression, such as the right to leaflet on the premises?

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Privacy Under the Constitution

The oldest privacy right in the federal Constitution is contained in the Fourth Amendment's protection against unreasonable searches and seizures. This guarantee is very specific, however, and is most often used to challenge police searches in criminal cases. The Supreme Court has extended the right to privacy far beyond this express guarantee against unreasonable searches and seizures, yet it has stopped short of saying that the federal Constitution contains a general right to privacy. The late Supreme Court Justice Louis Brandeis once expressed the right to privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man" (dissent in *Olmstead v. U.S.*, 227 U.S. 438 (1928)), but the justices have been selective in finding this right under the Constitution.

They have only found a constitutional right to privacy in certain, specific areas, as the following cases reveal.

Family Matters: The Court has held that the Constitution prevents states from passing laws requiring schools to teach only in English (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); requiring students to attend public rather than private schools (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)); requiring Amish children to attend school after the age of 14 (*Wisconsin v. Yoder*, 406 U.S. 205 (1972)); prohibiting persons from different races from getting married (*Loving v. Virginia*, 388 U.S. 1 (1967)); requiring poor people to pay a court fee before being able to get a divorce (*Boddie v. Connecticut*, 401 U.S. 371 (1971)); or restricting the ability of poor people to get married (*Zablocki v. Radhail*, 434 U.S. 374 (1978)). On the other hand, the Supreme Court upheld a state zoning law which prohibited non-family members from living together in a residential, suburban community (*Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

Sexual and Reproductive Matters: The Supreme Court has invalidated laws which require that persons sentenced to prison more than twice for "morally offensive" crimes be sterilized (*Skinner v. Oklahoma*, 316 U.S. 535 (1942)); statutes prohibiting abortion in all cases except where the mother's life was in danger (*Roe v. Wade*, 410 U.S. 113 (1973)); statutes requiring parental consent for all abortions of women under aged 16 (*Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)) and restricting the right of both married persons (*Griswold v. Connecticut*, 381 U.S. 479 (1965)) and unmarried persons to obtain contraceptives (*Eisenstadt v. Baird*, 405 U.S. 438 (1972)). Although the Court has interpreted the constitutional privacy right to protect the sexual activity of married persons, it has refused to extend this protection to cover private homosexual conduct between consenting adults (*Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976)). It has upheld the right of individuals to read pornographic materials in the privacy of the home (*Stanley v. Georgia*, 394 U.S. 557 (1969)), although not in public places (*Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1975)).

Informational Matters: The Court has ruled that the federal Constitution does not provide individuals with a right of privacy in the records, checks and deposit slips kept by their banks (*United States v. Miller*, 425 U.S. 435 (1976)). Banks can be required to record information about their customers and their banking activities and hand such information over to state and federal authorities (*California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974)). Doctors can be required to give state authorities the names of all patients receiving prescriptions containing certain narcotics (*Whalen v. Roe*, 429 U.S. 489 (1977)). The Supreme Court also upheld as constitutional a search by police (with a warrant) of a newspaper's offices to look for photographs of demonstrators who had severely beaten police officers (*Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)).

STATE PRIVACY PROVISIONS

ALASKA (Art. I, Section 22): "The right of the people to privacy is recognized and shall not be infringed." The Alaska Supreme Court has interpreted this provision to protect the right of an individual to smoke marijuana in the privacy of the home (*Ravin v. State*, 537 P.2d 494 (1975)).

CALIFORNIA (Art. I, Section 1): "All people are by nature free and independent and have an inalienable right to...pursuing and obtaining...privacy." The California courts have decided that this provision does not guarantee its residents the privilege of smoking a possibly harmful drug such as marijuana, even in the privacy of their homes (*National Organization for Reform of Marijuana Laws v. Gain*, 100 Cal. App. 3d 586, 161 Cal. Rptr. 181 (1979)).

FLORIDA (Art. I, Section 23): "Right of Privacy—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."

MONTANA (Art. II, Section 10): "The right of individual privacy is essential to the well being of a free society and shall not be infringed without the showing of a compelling state interest."

Other states which have express protections of privacy in their state constitutions include: Arizona, Hawaii, Louisiana, South Carolina and Washington. Privacy rights which have been upheld under state constitutions include informational privacy, sexuality, bodily integrity (for instance, the right not to be given tests for alcohol or drug use without consent), refusal of life-saving medical treatment for chronically or terminally ill patients, and individual choice for decisions relating to abortion.

How the Powerless Learn About Power

This handbook looks at power in the context of the U.S. Constitution. Power can also be approached in many other ways. Here are some ideas that would work with younger children.

Children are confronted with the idea of power in the concrete form of brute force and in the abstract form of legitimate authority. Like adults, children live in an atmosphere or nexus of power relationships. We could say that children are over-powered – physically, morally and legally – by adults, in general, and by parents, teachers, preachers, and police, in particular. Commands and mandates come from the family unit, the teacher's instructions, the police officer's badge, and the pulpit. Sanctions take the form of censure, censorship, a ruler, a paddle, or ultimately a confrontation with the juvenile justice system.

Children live in a world of symbols and signs. The flag, the police officer's badge, the Capitol, the White House, the police station, and the courthouse signify aspects of the law. The signs are omnipresent: Stop, Yield, Keep Off the Grass, Do Not Touch, No Trespassing, Private Property, and No Loitering, among many others. Each carries a legal message buttressed by a threat of punishment.

How does one explain to children the difference between the exercise of legitimate authority by parent, teacher, government official, and police officer, and the unlawful power of the bully, the gangster, and the mob? Why is some authority legitimate and other authority illegitimate?

William Golding's *Lord of the Flies* is on the surface an adventure story of English choirboys plane-wrecked on a tropical island. The thin veneer of civilization is quickly cut away to disclose the classic conflict of good and evil, brute force and reasonable authority, the nature of law and the meaning of justice.

Creative teachers have translated this story into an exercise entitled "The Island Game," in which, in imagination, students are placed for a period of time on an island without adult supervision. A leisurely paced exercise under the guidance of a nonintrusive instructor can lead to illuminating developments. Some classes will probably arrive at Aristotle's typology of governmental power: rule by one, rule by a few, and rule by the many. Given time, the activities may even confirm Aristotle's prediction of cyclical patterns. They may also reflect Max Weber's categories of authority: charismatic, traditional, and legal. Actually, it is too much to ask the elementary school child to mirror the sophistication of distinguished thinkers. It would not be unusual, however, to find these students reflecting some of the traditional questions relating to power and authority within this context.

Robinson Crusoe and other well-known (as well as teacher-created) stories and exercises can serve as lead-ins to the quest for an understanding of the origins of power and power relationships. Dilemma situations such as "Classroom without Rules" or "The Lawless Town" (a town without law-enforcement agencies) have been used successfully to pose the classic questions: Is might right? Why are rules and laws necessary? What is the source of power which legitimates laws and rules?

History and literature are depositories of case studies of legal authority, charismatic leadership, and unlawful domination. Hammurabi and his Code of Laws, Moses and his Ten Commandments, medieval kings and popes, the chiefs of Indian tribes, the leaders of primitive societies, and modern and contemporary dictators and democratic leaders offer opportunities for intellectual adventures in exploring the idea of power.

Lurking behind this inquiry is the impipresent issue of the nature of human nature. Do we really need rules and laws to regulate our conduct? Or are we so inherently evil that our conduct must be regulated by informal rules and formal legislation? This historic and philosophical debate between Rousseau et al. and Hobbes et al. can be translated for classroom study. It holds great promise for the law and numanities approach to understanding the role of law in American society and in the world community. A discussion of this humanities-centered issue of the law may even touch the hearts and minds of young students in ways in which traditional materials regularly fail to do.

About This Handbook

This is one of four special bar-school partnership handbooks on great constitutional themes: Liberty, Equality, Justice, and Power. The articles and strategies in these handbooks are reprinted from *Update on Law-Related Education*, a magazine published by the American Bar Association Special Committee on Youth Education for Citizenship and appearing quarterly during the school year.

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